A

Aw Ming Quee v Yap Yik Yong

B HIGH COURT (MELAKA) — DIVORCE PETITION NO MA-33–20–02 OF 2017
MAIDZUARA MOHAMMED JC
28 APRIL 2020

C *Family Law — Children — Maintenance — Application to vary terms in decree nisi — Whether decree nisi could be varied — Whether there were material changes in circumstances — Law Reform (Marriage and Divorce) Act 1976 s 96*

D On 12 April 2019, the applicant filed a notice of application to vary the decree nisi granted by the High Court on 25 July 2017. On 2 November 2010, Aw Rve Shin ('the child') was born to Aw Ming Quee ('the father') and Yap Yip Yong ('the mother'). On 10 February 2017, the father filed a petition for divorce. In May 2017, the father who was working in Myanmar returned to Malaysia from Myanmar. The father then file encl 19 as there were no allegations of harm, physical or otherwise to Rve Shin. At that time, Rve Shin was nine years old. The applicant applied for: (a) the right of custody and control of the child; (b) the respondent wife was granted the reasonable access to the child once a fortnight starting form 5pm on Saturday until 5pm on Sunday; (c) the applicant was to stop paying the maintenance for the child amounting to RM500 every month on 28th and the cost of after school care was paid to the respondent wife's account bank; and (d) the applicant was to be responsible for the payment of daily living expenses and any kind of education expenses until the child finished his study.

G **Held**, dismissing application to vary decree nisi in encl 19:

(1) The court was mindful that the paramount consideration was the welfare of the child and the court found that the child met the requirements of the law in that the child was of an age to express an independent opinion. Taking into considerations all material available, the court was of the impression that the child was not eager to provide access to the father. There were changes of circumstances. These changes of circumstances per se did not require the court to exercise its discretion to alter or vary the decree nisi granted on 25 July 2017 (see paras 11 & 30–31).

I **[Bahasa Malaysia summary**

Pada 12 April 2019, pemohon telah memfailkan notis permohonan untuk mengubah perintah decree nisi yang telah diberikan oleh Mahkamah Tinggi pada 25 Julai 2017. Pada 2 November 2010, Aw Rve Shin ('anak tersebut')

telah lahir daripada pasangan Aw Ming Quee ('bapa') dan Yap Yip Yong ('ibu'). Pada 10 Februari 2017, si bapa telah memfailkan satu petisyen perceraian. Dalam Mei 2017, si bapa yang pada ketika itu berkerja di Myanmar telah pulang ke Malaysia. Si bapa kemudiannya memfailkan Lampiran 19 memandangkan tiada sebarang dakwaan mudarat, sama ada secara fizikal atau sebaliknya, yang dilakukan terhadap anak tersebut. Pada masa itu, anak tersebut berumur sembilan tahun. Pemohon telah memohon untuk: (a) hak jagaan dan kawalan anak tersebut; (b) responden (si ibu) diberikan hak akses yang munasabah terhadap anak tersebut sekali dalam masa dua minggu bermula 5 petang, Sabtu sehingga 5 petang, Ahad; (c) pemohon berhenti membayar nafkah terhadap anak tersebut berjumlah RM500 pada hari ke-28 setiap bulan dan kos penjagaan selepas sekolah dibayar kepada bank akaun responden (si ibu); dan (d) pemohon bertanggungjawab untuk memberikan nafkah seharian dan sebarang perbelanjaan pengajian anak tersebut sehingga anak tersebut tamat pengajian.

Diputuskan, menolak permohonan untuk mengubah decree nisi dalam lampiran 19:

(1) Mahkamah berpendapat bahawa perkara utama ialah kebajikan anak tersebut dan mahkamah mendapati bahawa anak tersebut telah memenuhi kehendak undang-undang iaitu anak tersebut dianggap telah mencapai umur yang mampu memberikan pendapat sendiri. Mengambil kira semua fakta yang berikan, mahkamah berpendapat bahawa anak tersebut tidak berhasrat untuk memberikan akses kepada si bapa. Terdapat beberapa perubahan terhadap situasi-situasi. Namun perubahan situasi semata-mata tersebut tidak memerlukan mahkamah untuk menggunakan budi bicaranya untuk meminda atau mengubah decree nisi yang telah diberikan pada 25 Julai 2017 (lihat perenggan 11 & 30–31).]

Cases referred to

Diana Clarice Chan Chiing Hwa v Tiong Chiong Hoo [2002] 2 MLJ 97, CA (refd)

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 ss 88, 96, 97

KC Lee (ZY Sim with him) (Serri & Lee) for the applicant.
Patrick Thong (Mohd Latip & Assoc) for the respondent.

Maidzuara Mohammed JC:

[1] On 12 April 2019, the applicant filed a notice of application (encl 19) to vary the decree nisi granted by the High Court on 25 July 2017.

[2] The material parts of encl 19 are set out below:

NOTIS PERMOHONAN

BENARKAN SEMUA PIHAK YANG BERKENAAN hadir di hadapan Hakim Dalam Kamar pada 15 Mei 2019, pada jam pukul 9.00 pagi untuk mendengar satu permohonan oleh Pempetisyen Suami/Pemohon yang dinamakan di atas untuk Perintah-Perintah seperti berikut:

1. Kebenaran diberikan kepada Pempetisyen Suami/Pemohon untuk membuat permohonan ini;

2. Kebenaran diberikan kepada Pempetisyen Suami/Pemohon untuk *mengubah/menvariasikan* terma-terma dalam Dekri Nisi bertarikh 25 Julai 2017 menurut Seksyen 96 dan Seksyen 97 Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 (Akta 164) seperti berikut:

   [a] Kustodi dan hak pemeliharaan, penjagaan dan kawalan terhadap Anak Perkahwinan [AW RVE SHIN (L)] diberikan kepada Pempetisyen Suami/Pemohon;

   [b] Responden isteri diberikan hak akses yang munasabah kepada Anak Perkahwinan tersebut pada sekali setiap selang minggu ('once a fortnight') mulai pada 5.00 petang hari Sabtu sehingga 5.00 petang hari Ahad termasuk bermalam pada maiam hari Sabtu;

   [c] Pempetisyen Suami/Pemohon berhenti membayar nafkah Anak Perkahwinan tersebut sebanyak RM500.00 pada 28 hari tiap-tiap bulan dan kos after school care Anak Perkahwinan tersebut yang hendaklah dibayar ke dalam akaun bank Responden Isteri di HLBB No. Akaun: 39201007975 serta-merta dari tarikh Perintah ini diberikan; dan

   [d] Pempetisyen Suami/Pemohon akan menanggung dan membiayai segala perbelanjaan kehidupan dan juga segala bentuk perbelanjaan persekolahan Anak Perkahwinan tersebut sehingga Anak Perkahwinan tersebut menghabiskan pendidikannya.

3. Responden Isteri menyerahkan Anak Perkahwinan tersebut kepada Pempetisyen Suami/Pemohon serta-merta dari tarikh Perintah ini diberikan;

4. Sekiranya Pempetisyen Suami/Pemohon diberikan kustodi dan hak pemeliharaan, penjagaan dan kawalan terhadap Anak Perkahwinan tersebut, maka Responden Isteri hendaklah menyerahkan semula kepada Pempetisyen Suami/Pemohon kesemua dokumen asal Anak Perkahwinan tersebut (termasuk tetapi tidak terhad kepada Sijil Kelahiran, Kad Pengenalan dan Pasport Antarabangsa) dalam tempoh masa 24 jam selepas penyampaian Perintah ini;

5. Pempetisyen Suami/Pemohon diberi kuasa oleh Mahkamah Yang Mulia ini untuk mendapatkan bantuan daripada pihak Polis untuk memasuk ke

tempat kediaman Responden Isteri untuk membawa Anak Perkahwinan tersebut kepada Pempetisyen Suami/Pemohon;

6. Responden Isteri, sama ada secara sendiri, ejennya atau sesiapa yang berkenaan tidak boleh dengan apa cara sekalipun menghalang atau cuba menghalang Pempetisyen Suami/Pemohon dalam melaksanakan Perintah yang akan diberikan di sini atau salah satu daripadanya atau apa-apa bahagian daripadanya;

7. *Secara alternatif*, sekiranya kustodi dan hak pemeliharaan, penjagaan dan kawalan terhadap Anak Perkahwinan tersebut kekal diberi kepada Responden Isteri, kebenaran diberikan kepada Pempetisyen Suami/Pemohon untuk *mengubah/menvariasikan* terma-terma dalam Dekri Nisi bertarikh 25 Julai 2017 menurut Seksyen 96 dan Seksyen 97 Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 (Akta 164) seperti berikut:

Pempetisyen Suami/Pemohon diberikan *Hak untuk akses* yang munasabah ke atas Anak Perkahwinan tersebut untuk tempoh masa yang berikut:

[i] Pada setiap minggu iaitu mulai pada 5.00 petang hari Sabtu sehingga 5.00 petang hari Ahad termasuk bermalam pada malam hari Sabtu;

[ii] Pada setiap Hari Jadi Anak Perkahwinan tersebut dari pukul 9.00 pagi hingga 9.00 malam;

[iii] Pada setiap Hari Jadi Pempetisyen Suami/Pemohon dari pukul 9.00 pagi hingga 9.00 malam;

[iv] Sempena Tahun Baru Cina secara berselang tahun oleh Pempetisyen Suami/Pemohon dibenarkan iaitu bermula pada tahun 2020, Anak Perkahwinan tersebut akan menyambut Tahun Baru Cina dengan Pempetisyen Suami/Pemohon pada eve of Tahun Baru Cina hingga hari ketiga Tahun Baru Cina tidak kira Tahun Baru Cina jatuh pada hari apa, manakala pada tahun 2021, Anak Perkahwinan tersebut akan menyambut Tahun Baru Cina dengan Responden Isteri untuk tempoh yang sama dan begitulah secara bergilir sehingga Anak Perkahwinan tersebut mencapai umur 18 tahun; dan

[v] Pada setiap musim cuti persekolahan Anak Perkahwinan tersebut, separuh dari tempoh musim cuti persekolahan Anak Perkahwinan tersebut.

8. Terma-terma yang lain dalam Dekri Nisi bertarikh 25 Julai 2017 dikekalkan;

9. Kos permohonan ini ditanggung oleh Responden Isteri;

10. Perintah atau relif lain sebagaimana yang Mahkamah Yang Mulia ini fikir wajar dan sesuai.

A FACTS MATERIAL IN RESPECT OF ENCL 19

[3] On 2 November 2010, Aw Rve Shin ('Rve Shin') was born to Aw Ming Quee ('father') and Yap Yip Yong ('mother'). In this respect, reference is made to the submission filed by the mother at para 1(a).

B

[4] On 10 February 2017, the father filed a petition for divorce.

[5] In May 2017, the father who was working in Myanmar returned to C Malaysia from Myanmar. In this respect, reference is made to encl 20 para 15.

[6] On 25 July 2017, the High Court granted the decree nisi for divorce. Rve Shin was less than six years old at the time.

D **[7]** The material parts of the decree nisi are set out below:

DECREE NISI
[PERCERAIAN]

E PETISYEN DI ATAS SETELAH DIPANGGIL UNTUK MEDIASI dalam kehadiran Encik Lee Kuang Chaow Peguamcara bagi pihak Pempetisyen Suami, Encik Patrick Thong Peguamcara bagi pihak Responden Isteri, Pempetisyen Suami dan Responden Isteri;

F MAKA DENGAN INI DIUMUMKAN DAN DIDEKRIKAN bahawa perkahwinan yang dilangsungkan pada 18 November 2001 di Chee Teong Beow Temple, Negeri Melaka (melalui Daftar Perkahwinan No 496941) di antara AW MING QUEE dengan YAP YIK YONG dibubarkan atas persetujuan bersama dengan serta-merta dan dijadikan mutlak daripada tarikh Perintah ini.

DAN DIPERINTAHKAN SECARA PERSETUJUAN bahawa:

G [a] Kustodi dan hak pemeliharaan, penjagaan dan kawalan terhadap Anak Perkahwinan [AW RVE SHIN (L)] diberikan kepada Responden Isteri;

[b] Pempetisyen Suami diberikan akses yang munasabah kepada Anak Perkahwinan tersebut pada sekali setiap selang minggu ('once a fortnight') mulai pada 5.00 petang hari Sabtu sehingga 5.00 petang hari Ahad H termasuk bermalam pada malam hari Sabtu;

[c] Pempetisyen Suami membayar nafkah Anak Perkahwinan tersebut sebanyak RM500.00 pada 28 hari tiap-tiap bulan sehingga Anak Perkahwinan tersebut menghabiskan pendidikan ke tahap universiti/kolej atau mencapai umur Dua Puluh Satu (21) tahun sekiranya Anak I Perkahwinan tersebut tidak meneruskan pendidikan ke tahap universiti/kolej;

[d] Pempetisyen Suami membayar nafkah Responden Isteri sebanyak RM500.00 setiap bulan pada atau sebelum 28 hari tiap-tiap bulan dan kedua wang nafkah Anak Perkahwinan tersebut dan Responden Isteri dan

kos after school care Anak Perkahwinan tersebut hendaklah dibayar ke dalam akaun bank Responden Isteri di HLBB No. Akaun: 39201007975;

[e] Pempetisyen Suami terus menanggung pembayaran pinjaman harta sepencarian iaitu sebuah rumah teres satu tingkat yang beralamat di No. 22, Jalan TMJ 3, Taman Tanjung Minyak Jaya, 75250 Melaka termasuk pembayaran bil cukai tanah, cukai pintu, caj elektrik, caj air dan kos after school care Anak Perkahwinan tersebut. Sekiranya terdapat penjualan ke atas harta sepencarian ini pada masa depan, hasil keuntungan penjualan akan dibahagikan secara sama rata di antara Pempetisyen Suami dan Responden Isteri;

[f] Pempetisyen Suami bersetuju pindah keluar dari rumah Perkahwinan tersebut pada atau sebelum hujung bulan Ogos 2017;

[g] Pempetisyen Suami terus dan sambung membayar insurans Anak Perkahwinan tersebut sebanyak RM150.00 setiap bulan untuk Great Eastern Life Assurance 'Smart Protect Essential Insurance 2 No. Polisi: 1009351848 tanpa gagal sehingga tempoh matang polisi insurans tersebut;

[h] Kos Petisyen ini ditanggung oleh Pempetisyen Suami;

[i] Kebebasan untuk memohon; dan

[j] Jika anda, Pempetisyen dan Responden tersebut di atas gagal mematuhi Perintah seperti yang dipohon ini atau gagal mematuhi Perintah ini mengikut masa yang ditetapkan di dalamnya, anda adalah bertanggunggan kepada proses perlaksanaan bagi tujuan memaksa anda mematuhi yang sama.

[8] As stated above, on 12 April 2019, the father filed encl 19. There are no allegations of harm, physical or otherwise, to Rve Shin in encl 19. Rve Shin was nine years old at the time.

APPLICABLE LAW IN RESPECT OF ENCL 19

[9] The applicable law in respect of encl 19 considered by this court included, among others, the following:

(a) s 96 of the Law Reform (Marriage and Divorce) Act 1976;

(b) s 97 of the Law Reform (Marriage and Divorce) Act 1976;

(c) s 88 of the Law Reform (Marriage and Divorce) Act 1976; and

(d) *Diana Clarice Chan Chiing Hwa v Tiong Chiong Hoo* [2002] 2 MLJ 97 (CA) at p 104.

A THE COURT'S APPROACH IN RESPECT OF ENCL 19

[10] On 16 July 2019, this court conducted an interview of Rve Shin with the assistance of a Mandarin interpreter. He was nearly nine years old on the date of the interview.

B

[11] This court is mindful that the 'paramount consideration is the welfare of the child' and with regard to the interview, this court found that Rve Shin met the requirements of the law in that Rve Shin was 'of an age to express an independent opinion'.

C

[12] The father's application in encl 19 was based on changes of circumstances.

D **[13]** This court reviewed the cause papers filed in respect of encl 19 as identified and listed in the written submission by both parties.

[14] As held by the Court of Appeal in *Diana Clarice*'s case, this court carried out a review of these cause papers for the purposes of coming to a determination of encl 19. Many averments were disputed by either side and as such, this court only relied on undisputed facts from these cause papers which are material to encl 19.

E

Circumstance 1

F

[15] As stated above, the father came back from Myanmar to Malaysia on or about May 2017. According to the father, during that period, access to the father as per the decree nisi was observed. The father's complaint is that since 8 December 2018, access including access via mobile phone to Rve Shin by the father were denied.

G

[16] A substantial part of the contents of the affidavits by the mother and the father relate to events prior to the decree nisi.

H

[17] This court held that these events were not material for the consideration of encl 19.

I **[18]** Events post decree nisi were generally denied and/or disputed — although the father admits that he formed a relationship with an individual, LHY (who is also the mother's niece and therefore Rve Shin's cousin sister) after the decree nisi. In this respect, reference is made to encl 24 para 37.4.

[19] In December 2018, Rve Shin went for holidays to Australia. He identified that there were seven persons who went on the trip — himself, the father, the paternal grandmother, two paternal aunties, the father's nephew and LHY (whom the mother alleged had an extra marital relationship with the father even before the decree nisi which allegation is denied by the father).

[20] Rve Shin identified this cousin (from photographs exhibited in the affidavits).

[21] Rve Shin was not eager to talk about this trip.

However, Rve Shin shared that he was not happy as he was sick during the trip. When questioned further, he said he was sick for two days, he was not taken to see any doctor, and he was not given any medication.

[22] With regard to contact via telephone, this court noted that the father remains able to send messages and make calls to the mother's mobile phone. The issue is whether the mother responded to such messages and calls. There was scant material before this court as to whether and how often the father contacted Rve Shin on the mother's mobile before 8 December 2018. Without such material for comparison, this court was unable to come to any determination or proper determination with regard to this issue.

Circumstance 2

[23] The mother and Rve Shin are more often staying in the mother's parents' house (rather than the matrimonial home).

[24] Rve Shin described the maternal grandmother's house — as he thinks it is owned by the maternal grandmother — two stories, terrace corner lot, I bedroom downstairs, four bedrooms upstairs. He stated that he and the mother and the maternal grandparents share the bed room downstairs.

[25] He shared with this court that a cousin brother stays with them in that house. He also shared that when this cousin brother did not go for wushu training, when the cousin brother came home from 'transit', they play together for example badminton or basketball.

[26] With regard to the house he stays in when he has overnight access with the father, Rve Shin stated that a cousin brother — younger than him — stayed there. He shared that the cousin was in standard 2. He also stated that he 'does not like to live' with the 'younger brother'.

Circumstance 3

[27] Rve Shin changed school since June 2019. This is common ground between the father and the mother although the father alleged that the change was instigated by the mother while the mother claimed that the change was at Rve Shin's request.

Rve Shin observed that the previous school was nearer in distance but there are many traffic lights to get there. In contrast, the new school was a little further but he would arrive at the new school faster. Rve Shin expressed that he 'likes (his) new school'.

MISCELLANEOUS ISSUE

[28] The mother submitted that the matrimonial home should be sold and the sale proceeds be divided between her and the father. Alternatively, mother submitted that she ought to be allowed to buy out the father's share of the matrimonial home.

[29] There was no cross-application filed by the mother including with regard to the matrimonial home. This court did not make any determination with regard to the matrimonial home.

CONCLUSION

[30] Taking into consideration all material available to this court, this court was of the impression that Rve Shin is not eager to provide access to the father. When asked by this court as to what he would rather do on such occasions, his reply was to 'stay at home' (ie mother's parents' house) 'and play with the cousin at home'.

[31] There have been changes of circumstances. However, these changes of circumstances per se do not require this court, at this juncture, to exercise its discretion to alter/vary the decree nisi granted on 25 July 2017.

[32] On 4 March 2020, encl 19 was dismissed. The decree nisi dated 25 July 2017 was maintained.

[33] This court also ordered that costs shall be borne by each party.

Application to vary decree nisi in encl 19 dismissed.

Reported by Mohd Kamarul Anwar